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In the Supreme Court of the United States

OCTOBER TERM, 1906.

No. 123

A. B. BALLARD and JOSEPHINE W. BALLARD,
vs. Plaintiffs in Error,
CHARLES W. HUNTER, A. HACKLER and the BOARD OF DIRECTORS, ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

In Error to the Supreme Court of Arkansas.

Abstract, Brief and Argument

For the Defendant in Error, Charles W. Hunter.

L. P. BERRY,
Counsel for Defendant in Error.

E. C. TOOF & CO., PRS. & LITHS. MEMPHIS

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Statement of Case for Defendant in Error, Charles W. Hunter.

Act XIX. of Acts 1893, page . s amended by Act LXXV., of Acts 1893, page 119, as ther amended by Act LXXI., of Acts 1895, page 88, organized parts of seven counties lying in the Mississippi river and St. Francis river basins into a levee district, and provided for the building of a levee along the Mississippi river front and the digging of canals to drain the swamp and overflowed lands of said basin. These acts, after providing for the creation of the St. Francis Levee District, provide for the creation of a board of directors, who shall be a body politic and corporate, with power to sue and be sued; for a listing of the lands in said district in the names of the owners and mortgagees of record; for an ascertainment of the betterment arising to the lands within the district by

reason of the construction of a levee; for the assessment of the cost of building said levee upon the said betterment; for the collection of said assessment by a collector; for the return of lands as delinquent where the assessment is not paid with a penalty of 25 per cent. and interest; that the assessment shall be a first lien upon said lands in the nature of a mortgage; that no error in the description of the lands shall invalidate the assessment if a sufficient description is given to ascertain where the land is situated; for the collection of delinquent assessments, penalties and costs by chancery proceedings had in the counties where the lands are situated; that all or any part of the delinquent lands in each county may be included in one suit; that it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; that no informality or irregularity in holding the meetings or in the description or valuation of the lands or in the names of the owners, or the number of acres therein, shall be a valid defense to such action; that where a defendant resides in the county in which the suit is brought and appears by the record of deeds in said county to be the owner of any of the lands proceeded against, personal service of summons shall be had at least twenty days before he is required to answer; that where the ownership of lands is unknown to the Board of Directors they shall be proceeded against as owned by unknown owners; that where a defendant is a non-resident of the county in which suit is brought or the land is owned by an unknown owner, public notice of the pendency of such suit shall be given by publication in some newspaper published in the county for four weeks prior to the day such defendants are required to answer; the

act prescribes the form of notice, which gives the purpose of the suit, describes the lands proceeded against, each supposed owner's name being set opposite his, her or its name, respectively, together with the amounts severally due from each, and is directed not only to the alleged owner, but to all others interested in said lands, and warning them to appear and make defense to said suit. In addition to the notice by publication as against non-residents of the county and unknown owners, the act provides for personal service of summons upon the alleged owner where he is found within the county, and for personal service of summons upon any occupant that may be found upon any of the lands proceeded against regardless of whether he is named as a party defendant to the suit or not; prescribes that the cause shall stand for trial at the first term of the court after the complaint is filed, if the time required for the publication of the notice and service of summons shall expire either before the first day of the term or during the term to which the suit is brought; that the suits may be disposed of on oral testimony as in ordinary suits at law; for the granting of continuances as to a part of the lands without affecting the duty of the court to dispose finally as to other lands; that where no answer is filed, or if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint; that the court shall render judgment against the persons claiming to be the owners of the lands for the delinquent assessments, penalty, interest and costs of suit, and that such judgments shall be enforced wholly against the lands and not against any other property or estate of defendants; that the proceedings and judgment shall be in the nature of proceedings in

rem; that this act shall be liberally construed so as to give said assessment lists the effect of bona fide mortgages for a valuable consideration and a first lien upon said lands as against all persons having an interest therein; provides for a sale by a commissioner, for cash, after having first given two weeks' notice of such sale by publication in a newspaper; that the commissioner shall execute deeds to the several purchasers; that where no person shall bid the amount due for assessment, penalty, interest and costs of suit on any tract, the commissioner shall bid the same in for the plaintiff and execute his deed therefor; that the titles to said lands shall become vested in such purchasers as against all others whomsoever, and that such deeds, when executed in conformity with this act and recorded, shall be received as evidence in all cases showing an indefeasible title in such purchasers, unassailable in either law or equity; that all persons having an interest in said lands or recorded liens therein shall be bound thereby and by the judgment and decree rendered therein in the same manner as in other chancery suits, saving to infants and insane persons without guardian or curators, the right to appear and except to said proceedings within twelve months after the removal of their disabilities; that at any time within three years after the rendition of the final decree in said causes the owner of the lands may file his petition in the court rendering the decree alleging the payment of the taxes on the land for the year for which they were sold, and upon the establishment of that fact the court shall vacate and set aside the decree; provided, further, that said suits shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided,

and except that neither attorneys nor guardians ad litem, nor any provision of Section 5877 of Sandels & Hill's Digest of the statutes of Arkansas shall be required. (See Appendix to brief of Plaintiffs in Error.)

The foregoing is, in brief, the provisions of the special act under which the decree and sales were had that are attacked as being unconstitutional in the case at bar. Proceeding under the authority of this act the Board of Directors of the St. Francis Levee District, on December 21, 1897, filed a suit in the Crittenden Chancery Court, styled Board of Directors, St. Francis Levee District, Plaintiff, vs. Memphis Land and Timber Company, A. B. Ballard et al., Defendants. This complaint alleged the creation and organization of the St. Francis Levee District; the ascertainment of the benefit accruing to the lands in said district by reason of the construction of a levee; the vote and levying of an assessment upon said betterment; the return of the tracts sued upon as delinquent for the years therein mentioned; that A. B. Ballard was the owner of the west half and southeast quarter of section thirty-two, in township four north, and in range seven east, containing 480 acres; also of the west half of the northeast quarter of section thirty-two in township four north and in range seven east, containing eighty acres, and that the same were delinquent for levee taxes for the years 1895, 1896 and 1897, and setting forth the amount of taxes, penalty and interest due upon each tract; that A. B. Ballard (and others) were non-residents of the county of Crittenden and prayed the issuance of process to bring them before the court; that the taxes, etc., be declared a first lien and the lien foreclosed in default of payment, and the said several tracts sold in

default of payment thereof. The complaint was verified by an attorney for the plaintiff. Section 6121 of Kirby's Digest provides: "The verification of any pleading of a corporation may be by * * * its attorney in the action." (Tr. p. 9, et seq.) The decree in said cause was rendered on February 14, 1898, a day of the January (1898) term of the Crittenden Chancery Court, and was responsive to the complaint and within the issues raised. (Tr. p. 14, et seq.) The decree finds that the defendants * * * A. B. Ballard, * * * (and others), owners of lands who were unknown, were severally constructively summoned by publication in a newspaper published in Crittenden county, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein. (Tr. p. 16.) The decree awards taxes, penalty, interest and costs against the lands described in the complaint for the years therein alleged as delinquent, decrees sale in default of payment and appoints a commissioner to execute the decree. The decree is based upon the complaint, documentary evidence and oral evidence of witnesses named. (Tr. p. 16.) The sale under said decree was had by the commissioner on the 13th and 14th days of June, 1898, and was reported to and confirmed by the court at its July term, 1898. (Tr. p. 21.) The commissioner reported the sale of the lands in controversy to defendant in error, Charles W. Hunter, viz.: The west half and southeast quarter of section thirty-two, in township four north, and in range seven east, containing 480 acres, and the west half of the northeast quarter of section thirty-two, in township four north, and in range seven east, containing eighty acres, for the taxes, penalty, interest and costs due thereon, respectively. (Tr. p. 22.)

At the January term, 1899, the deed from the commissioner to Hunter was acknowledged in open court and approved. (Tr. p. 25, and Tr. p. 69.)

At the September term, 1899, on September 25, the plaintiffs in error filed their pleading in the Crittenden Chancery Court, and defendant in error, Charles W. Hunter, entered his appearance thereto. (Tr. p. 26, et seq.) Neither the defendant, A. Hackler, nor the defendant, Board of Directors, St. Francis Levee District, ever entered their appearance to said suit, nor were they ever made parties to said proceeding by service either personal or constructive. The case was tried upon an agreed statement of facts. (Tr. p. 38.) At the February term, 1902, the case was tried and the cause dismissed and an appeal taken to the Supreme Court. (Tr. p. 72.) The proceedings had in the Supreme Court resulting in the affirmance of the decree of the lower court are found on page 79 of transcript; the opinion rendered by the Supreme Court is found on page 81 of transcript. A large part of the transcript is taken up with the record of a suit that should not have been incorporated therein.

The case is now here on error, the assignments of error being set out in brief of plaintiffs in error, and also on pages 5-8 of transcript.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR, CHARLES W. HUNTER.

A judicial sale of lands for illegal taxes, penalty, interest and costs is not a taking of property without due process of law.

Assignments of Error I., II. and III. raise the question of the sale of the lands of plaintiffs in error for illegal taxes, penalty, interest and costs of suit. Plaintiffs in error claim to own only the south half of the northwest quarter and the southwest quarter of section thirty-two in township four north, and in range seven east, and allege that as these lands were sold as a part of and under the description of the west half and southeast quarter of section thirty-two, in township four north, and in range seven east, they were sold in part for taxes, penalty, interest and costs not legally chargeable thereon, and that thereby they were deprived of their property without due process of law.

Assignment of Error IV. raises the question of the sale of the lands of plaintiffs in error for costs not legally chargeable thereon, and that thereby they were deprived of their property without due process of law. It should be borne in mind that the sales under consideration are judicial sales and not ministerial sales. Also, that the proceeding adopted by plaintiffs in error is a collateral attack upon such sales. (Opinion, Tr. 83.) The great bulk of the cases cited by counsel for plaintiffs in error are cases relating to minis-

terial sales and not to judicial sales. The objections urged are matters of defense that should have been made upon the hearing of the cause. The decree was rendered and the sales made after notice to the alleged owner and all others interested to appear and make defense. These objections are answered by referring to the obvious fact that the term, "due process of law," refers to procedure, and that the provision that no person shall be deprived of his property without due process of law guarantees that every person shall hold his property inviolate until deprived thereof by a course of procedure which conforms to the characteristics of "due process of law." The phrase is not designed to protect against the cause of action, but only against the procedure by which the cause of action is enforced. It relates to procedural and not to substantive rights. Assuming, then, that the procedure was such as was authorized by the levee act, the mere fact that the lands of plaintiffs in error were sold in part for taxes, penalty, interest and costs not legally chargeable thereon, if in fact true, does not amount to a deprivation of property without due process of law.

Burcham v. Terry, 55 Ark. 398.

Doyle v. Martin, 55 Ark. 37.

Kelly v. Laconia Levee District, 74 Ark. 202; 85 S. W. 249.

Minneapolis, Etc., v. Debenture Co., 81 Minn. 66.

Due process of law does not require that the true owner of land be named in a judicial proceeding for the collection of delinquent taxes where the land is described in a public notice directed to an alleged owner and all others interested therein.

Assignment of Error V. raises the question of the failure to make Josephine W. Ballard a party to the levee proceedings by name, and contends that because she was not made a party by name she has been deprived of her property without due process of law. This objection is answered in the opinion of the court below. (Tr. p. 83.) Judge Cooley, in his work on Taxation, third edition, page 884, says: "Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that an opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form." The State possesses all the attributes of sovereignty save those surrendered to the Federal government or prohibited to them by the Federal constitution. Among these attributes is the right to prescribe forms of action for the enforcement of rights public or private. The only inhibition upon the exercise of this right is the provision of the constitution that these forms of action shall conform to the requirements of the meaning of the phrase, "due process of law," the principal characteristic of which is that notice and an opportunity to be heard must be provided for. The State may therefore provide for a proceeding strictly in rem, if notice and an opportunity to be heard is provided for. If it may provide for a proceeding strictly in rem it may also provide "that it shall be immaterial that the names of the owners are incorrectly al-

leged." The failure, therefore, to name Josephine W. Ballard in the published notice which described the land and ran to A. B. Ballard and all others interested therein was not a deprivation of her property without due process of law.

Iowa Central Ry. Co. v. Iowa, 160 U. S. 389.
Davidson v. New Orleans, 96 U. S. 97.
Tyler v. Judges, 175 Mass. 71.

The four weeks' notice provided by the levee act by publication to unknown owners and owners of lands who are non-residents of the county in which suit is brought is not so unreasonable as to amount to a taking of property without due process of law, nor does it abridge the privileges or immunities of citizens of the United States, nor does it discriminate against citizens of other States, nor does it amount to a denial of the equal protection of the laws to persons within the jurisdiction of the court.

Assignment of Error VI. attempts to raise all the foregoing questions. The levee act provides for four weeks' notice by publication to unknown owners and non-residents of the county in which suit is brought. So far as service of process is concerned the levee act divides defendants into two classes. First, residents of the county in which suit is brought who appear to be owners of lands sued upon by the record of deeds of said county; and second, non-residents of the county and unknown owners. The act also provided for additional service where the defendant is in the county or there is an occupant upon the land. This service is in addition to the publication, and is made by the personal service of summons upon the defendant or occupant, respectively. The same service is provided for citizens of the State who are

non-residents of the county in which suit is brought, as is provided for citizens of other States. The act therefore does not discriminate against citizens of other States, nor when viewed in any light can we conceive how it can be said to abridge the privileges or immunities of citizens of the United States. As to the violation of the due process of law clause it has been repeatedly settled that where the procedure provided allows an opportunity for a hearing at any stage of the proceedings it is sufficient. The procedure provided must be so drastic and unreasonable as to shock the conscience and amount to a practical confiscation of a citizen's property by legislative act before it will be declared violative of this clause. In the case of non-residents of the county the act provides for four weeks' publication of a designated notice. A decree of sale cannot be taken before that time. After the decree two weeks' notice of sale is required before the property can be sold. At any time before the sale the owner can come in and redeem his property by payment of the taxes due thereon. The act further provides that the owner can come in at any time within three years from the date of the final decree and by showing payment of taxes have the decree set aside. These provisions for contesting the validity of the tax are certainly reasonable. The following cases bear out our contention:

Arndt v. Griggs, 134 U. S. 316.
Bellingham Bay v. New Whatcom, 172 U. S. 314.
Davidson v. New Orleans, 96 U. S. 97.
Tyler v. Judges, 175 Mass. 71.
Hager v. Reclamation Dist., 111 U. S. 701.
Wurtz v. Hoagland, 114 U. S. 606.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.

Bauman v. Ross, 167 U. S. 548.
Hanover Nat'l Bank v. Moyses, 186 U. S. 181, 192.
Manson v. Duncasson, 166 U. S. 533.
Johnson v. Hunter, 127 Fed. Rep. 222.
Huling v. Kaw Valley Ry., 130 U. S. 559-563.

The levee act is not a private act, but a public act, operating over a limited territory of which plaintiffs in error were bound to take notice, and proceedings had under this levee act constitute due process of law.

Assignment of Error VII. raises the question that the levee act is a private act of which plaintiffs in error were not bound to take notice, and that therefore the proceedings had under such act are not binding upon them and constitute a taking of their property without due process of law. We deem it unnecessary to take up the time of the court in argument of this question. The cases cited ante under Assignment of Error VI. are a sufficient answer. See also—

Huling v. Kaw Valley Ry., 130 U. S. 559-563,
Johnson v. Hunter, 127 Fed. Rep. 222.

An erroneous construction by a State court of matters of practice under a State statute, where the statute as construed by the court provided for notice and an opportunity to be heard, is not a deprivation of property without due process of law.

Assignments of Error VIII. and IX. raise the question of the proper construction of the levee act by the State Supreme Court. The State has the right to enact any course of procedure it pleases, so long as it amounts to due process of law. The judiciary of the State has the final right to construe the State statutes, and if the stat-

utes as construed by the State Supreme Court do not deprive the defendant of due process of law no constitutional question is raised. The question of due process of law and the question of the proper construction of a State statute have nothing in common.

Baltimore Traction Co. v. Baltimore Belt Ry. Co., 151 U. S. 138.
Castillo v. McConnico, 168 U. S. 683.
Brown v. New Jersey, 175 U. S. 175.
Allen v. Georgia, 166 U. S. 138.
West v. Louisiana, 194 U. S. 263.
Thorington v. Montgomery, 147 U. S. 492.
In re King, 46 Fed. Rep. 911.

Assignment of Error VIII. says that the complaint in the cause of Board of Directors, St. Francis Levee District, v. Memphis Land and Timber Company, A. B. Ballard et al., did not state a cause of action. Conceding, for the purpose of argument, that a failure to state a cause of action would be fatal, it appears from a reading of the complaint (Tr. p. 9, et seq.) that a cause of action was stated. It may have been defective, but it was held sufficient by the State courts as well as by the Federal Court in Johnson v. Hunter, ante. The assignment also says that the affidavit to support the warning order was insufficient. This raises no constitutional question. The Legislature might have dispensed with any affidavit whatever if so minded. Therefore, even if the court erred in the construction of the statute, its construction prevails. An error in construction of an unessential provision of a statute which does not deprive the defendant of due process of law raises no question of constitutional construction. But the State court did not err in its con-

struction of the statute. The affidavit was sufficient and was by the State court properly construed as sufficient. True, it was held otherwise by the United States Circuit Court of Appeals for the Eighth Circuit upon appeal in the case of Johnson v. Hunter, not yet reported. But that court was in error in assuming that the question of the sufficiency of the affidavit was not brought to the attention of the court in the case of Ballard v. Hunter. It was brought before the court and was pressed upon the court in brief of counsel for Ballard that the affidavit was insufficient because it did not allege that Ballard was at the time absent from the county, and that there was no occupant upon the land. The court ignored this contention and held that an affidavit alleging non-residence alone was sufficient. This was the holding in Johnson v. Hunter, 127 Fed. Rep. 222, which case was followed by the Supreme Court. At the proper time a petition for certiorari will be presented to this court to bring the case of Johnson v. Hunter before this court for review for reasons which will be set out in the petition. The assignment also alleges that there was no sufficient proof of publication produced to the court. The decree recites (Tr. p. 15), "And the defendants * * * A. B. Ballard, * * * and owners of lands who are unknown, were severally constructively summoned by publication in a newspaper published in Crittenden county, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein." Kirby's Digest of the Laws of Arkansas, Section 4425, provides: "In all cases where it appears from a recital in the records of any such court, that such notice has been given, it shall be evidence of such fact." There is no evidence in the record of this

cause to the contrary. The said assignment also alleges that the record does not contain the necessary jurisdictional facts. The court held that it was not a special statutory proceeding, and that it was not therefore necessary for the record to recite jurisdictional facts. Assignment of Error IX. alleges that the cause was heard and decided without evidence. The decree (Tr. p. 16) recites the evidence upon which it was heard. The statute provides that it may be heard upon oral evidence. It was unnecessary for such evidence to be incorporated in the record.

For the reasons set forth above it is respectfully submitted that the writ of error sued out in this cause should be dismissed, or the decree of the Supreme Court of the State of Arkansas should be affirmed, with costs.

Respectfully submitted,

L. P. BERRY,

Of Counsel for Charles W. Hunter, Defendant in Error.